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DUAR TUAN KIAT & ANOR

v.

CAROTECH BHD & ORS

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HIGH COURT MALAYA, KUALA LUMPUR
AZIZAH NAWAWI JC
[ORIGINATING SUMMONS NO: 24NCC-394-11-2012]
23 FEBRUARY 2013

C ***CIVIL PROCEDURE:*** *Judge - Recusal from hearing - Application for - Grounds - Whether there was a real danger of bias - Whether there may be a case of pre-judgment - Whether court dealt with merits of application - Whether application bordered on abuse of court process and contempt*

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The second plaintiff ('MTB'), as the debenture holder, had appointed the first plaintiff ('P1') as the receiver and manager for the assets and undertakings of the first defendant ('the company'). When the first plaintiff was denied access to the company's premises to take possession and control of the business premises and the company's assets and records, he filed the instant originating summons ('OS') to, *inter alia*, injunct the company, its directors (the second and third defendants) and their servants and agents from interfering with the execution of his lawful duties under the debenture. Although an *ex parte* injunction was granted, P1 was still denied access to the company's premises, this time on the ground that the fourth defendant ('D4') was in possession of the premises. It also appeared that the assets charged under the debenture had been transferred to D4 by a resolution of the company. The court allowed the plaintiff to add D4 as a party to the proceedings and allowed an interlocutory injunction against D4 which was heard on an opposed *ex parte* basis. After the interim interlocutory injunction was granted, D4 immediately made an oral application for a stay which was granted by the court on the same day. D4 appealed to the Court of Appeal ('COA') against the granting of the injunction and against an order allowing the plaintiff to add MTB as co-plaintiff to the proceedings ('the two appeals'). Subsequently, D4 applied for a stay of all proceedings in the OS pending the disposal of the two appeals. The application for a stay was dismissed on the basis that D4 had failed to show any special circumstances that merit a stay of the

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hearing of the OS. Subsequently, D4 filed an application ('encl. 89') for the orders, *inter alia*, that the Judicial Commissioner ('JC') recuse herself from hearing and disposing of all subsequent proceedings including the re-amended originating summons ('OS proceedings') and that these OS proceedings be stayed until encl. 89 was disposed. D4 submitted that the JC should have recused herself from hearing this case as it would appear to a reasonable and right-thinking member of the public that there was a real danger of bias by reason that there may be a case of pre-judgment premised on the following decisions of the JC since: (i) the reliefs in the *ex parte* injunction were similar to the final reliefs in the OS, by granting the *ex parte* injunction it was just like granting the final reliefs; and (ii) the JC had decided on the issue of *locus standi* in the opposed *ex parte* application for injunction, therefore, in the event the JC proceeded to hear the OS proper, and the *locus standi* issue was raised again, it was an unavoidable fact that the JC would not be inclined to decide in favour of D4 given her previous decision. For the aforesaid reasons, there was a real danger of bias by reason of pre-judgment. On the contrary, the plaintiffs argued that there was no pre-judgment as there was no determination of the merits of the OS and that there had not been any finding of facts in the opposed *ex parte* application. On the issue of *locus*, the plaintiffs submitted that an adverse decision made could not be the basis to disqualify a judge. Further, the *ex parte* injunction never took effect because of the immediate stay and it had lapsed after 21 days.

Held (dismissing encl. 89 with costs):

(1) The threshold test applicable in an interlocutory injunction is different from that of the main application itself. In an interlocutory application, the court is merely required to make a finding of serious issues to be tried, whereas the merits of the case will be decided in the hearing of the OS itself. The judgment of this court in the opposed *ex parte* interlocutory stage did not deal with the merits of the OS but merely on the issue of whether there was any *bona fide* serious issue to be tried that warranted the granting of the *ex parte* injunction. Even though the reliefs in the *ex parte* application were similar to the OS, this court had not dealt with the merits of the application. (paras 20, 22 & 23)

(1a) There was no finding of facts at the interlocutory stage. Indeed it is a requirement of the law that this court must make a finding in the interlocutory stage. The court must decide whether to grant the application or to dismiss it. There is no such thing as abdicating one's judicial duties by refusing to decide or abstaining from making any decision simply because the reliefs in the interlocutory application are similar to the main application. Thus, D4 had failed to establish that there was a real danger of bias by reason of pre-judgment with regards to the issue of similar prayers in both the interlocutory application and the OS. (paras 23 & 26)

(2) The issue of *locus standi* was raised by D4's counsel. In fact, he only submitted on the issue during the opposed *ex parte* application for injunction. Since the counsel had raised the issue and had asked the court to decide the same, it was not proper for counsel to complain later that it amounted to real danger of bias by reason of pre-judgment simply because it was not decided in his favour (*Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors*; refd). (para 28)

(3) The reasonable and well informed member of the public would appreciate that the losing parties have a right to appeal to the appeal courts, subject to the laws applicable. All these are the natural sequence of events in any litigation, according to the law. It cannot be a basis of complaint that losing a number of applications would invariably make the 'ordinary, reasonable and well informed member of the public' to think that there was a real danger of bias by reason of pre-judgment. Herein, even though the *ex parte* interlocutory injunction was granted, it was immediately stayed by this court on D4's application, until it lapsed and was subsequently withdrawn by the plaintiffs. It never took effect. Therefore, winning in one and losing in three applications could not be the criteria of pre-judgment. The 'ordinary, reasonable and well informed member of the public' would appreciate that these applications went through the process of law, decisions were made and the aggrieved parties may take up the matter on appeal. (para 30)

(4) D4 had filed this application when the application to stay the whole proceedings was dismissed. D4 had appealed against the said decision as well as had invoked s. 44 of the Courts of Judicature Act 1964 by filing a similar application in the Court of Appeal. Indeed, in the application for stay, it was D4's submission that if stay was granted, it would obviate the need to file a recusal, and the basis for the recusal was the allegation of bias by reason of pre-judgment. This was not the usual or normal sequence of events, but bordered more towards abuse of process and contempt. (para 32)

Case(s) referred to:

Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors [1995] 1 CLJ 461 SC ***(refd)***

Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors [2002] 4 CLJ 268 CA ***(refd)***

Cheng Hang Guan & Ors v. Perumahan Farlim (PG) Sdn Bhd & Ors [1988] 2 CLJ 35; [1988] 1 CLJ (Rep) 435 HC ***(refd)***

Perumahan Farlim (PG) Sdn Bhd & Ors v. Cheng Hang Guan & Ors [1989] 2 CLJ 967; [1989] 1 CLJ (Rep) 127 SC ***(refd)***

Tai Choi Yu v. The Tribunal of the Special Commissioners of Income Tax & Anor [2004] 1 LNS 243 ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 44

For the plaintiffs - CL Wong (Wan Nurshafina with him); M/s Skrine
For the 4th defendant - Bastian Vendergon (Raven Siveanesan & YL Chau with him); M/s S Ravanesan

Reported by Ashok Kumar

JUDGMENT

Azizah Nawawi JC:

The Application

[1] Enclosure (89) is an application by Carotech BF Sdn Bhd ("4th defendant") for the following orders:

(i) that the learned Judicial Commissioner ("LJC"), Justice Azizah bte Nawawi do recuse herself from hearing and disposing of all subsequent proceedings including the re-amended originating summons dated 8 February 2013 ("OS proceedings");

(ii) that these OS proceedings be forthwith stayed till disposal of this application;

(iii) costs to be in the cause and other relief.

[2] The application is premised on these grounds:

(i) On 30 November 2012 this Honourable Court allowed an opposed *ex parte* injunction order, and on 8 February 2013, this Honourable Court had allowed the order sought by the 1st plaintiff to amend the amended originating summons dated 7 November 2012 to include Malaysian Trustees Berhad (MTB) as a co-plaintiff in these proceedings;

(ii) However, on 3 December 2012 the 4th defendant has filed an appeal against the first said decision of this Honourable Court ("the first appeal"), and on 21 February 2013 the 4th defendant filed an appeal against the second said decision, to the Court of Appeal ("the second appeal")

(iii) One of the grounds of appeal in the first appeal apart from *locus standi* was that the High court had even at that stage (*ex parte* interlocutory injunction stage) collectively granted the final reliefs to the plaintiff.

(iv) One of the grounds of appeal in the second appeal would be that the High Court had permitted the plaintiff to alter the character and capacity of suing retrospectively.

(v) In light of the said appeals, it was just and convenient that all proceedings hereunder be stayed pending the disposal of the said appeals in order that the key issues affecting the substantive originating summons are disposed off by the appellate court first.

(vi) A stay of proceedings was not granted by this Honourable Court, the appeals by the 4th defendant may be rendered nugatory and academic as the *status quo* may well be altered. There were therefore special circumstances warranting a stay of proceedings. Thus an appeal against that refusal to stay proceedings is being filed.

(vii) An application for stay of proceedings pending the said appeals was filed, but not granted, thus raising the real likelihood of bias in that the learned judge would be

predisposed to decide the final merits on the issues stated aforesaid against the 4th defendant. This would be even before the Court of Appeal has had the opportunity to consider and decide on those issues.

The Salient Facts

[3] The 1st plaintiff was appointed the receiver and manager ('the R&M') of the assets and undertakings of the 1st defendant, Carotech Berhad ("the company") by Malaysian Trustees Berhad ("MTB") on 1 November 2012 pursuant to the powers conferred upon MTB under a debenture dated 1 April 2011 ('debenture') executed by the company in favour of MTB as agent for various financial institutions (the 'financiers') which had granted loan facilities to the company.

[4] The 2nd plaintiff, Malaysian Trustees Berhad ("MTB") is the debenture holder.

[5] On 9 November 2012, an interim injunction was issued against the company, the 2nd and 3rd defendants as directors of the company, from interfering with or preventing the 1st plaintiff from entering and taking possession and control of the assets of the company charged to MTB.

[6] With the said court order dated 9 November 2012, the 1st plaintiff tried to gain access to the business premises of the company. They were denied entry and access to the business premises of the company on the basis that the 4th defendant is presently in possession of both premises. It would appear that the charged assets under the debenture have been transferred to the 4th defendant, a wholly owned subsidiary of the company, *vide* a company resolution dated 10 August 2012.

[7] An application to include the 4th defendant as a party was allowed by the court on 22 November 2012. An application for injunctive relief against the 4th defendant was filed by the 1st plaintiff and was granted by this court on 30 November 2012 after hearing both parties on an opposed *ex parte* application. The 4th defendant had filed an appeal against this decision on 3 December 2012 ('the 1st appeal').

[8] After the interim interlocutory injunction was granted by this court, counsel for the 4th defendant immediately made an oral application for a stay. The stay order was granted by this court on the same day.

[9] On 27 December 2012, the 1st plaintiff filed an application to include MTB as the 2nd plaintiff and for consequential amendments to the originating summons (OS). This application was granted by this court on 8 February 2013. The 4th defendant had also filed an appeal against this decision on 21 February 2012 ('the 2nd appeal').

[10] On 25 February 2013, the 4th defendant had applied for a stay of all proceedings in the OS pending the disposal of the first and second appeals in the Court of Appeal. It is to be noted that one of the grounds for the stay application as was submitted by counsel for the 4th defendant is that the grant of stay "would obviate the need to file a recusal application". The application for a stay was dismissed on the basis that the 4th defendant had failed to show any special circumstances that merit a stay of the hearing of the OS pending the hearing of the appeals in the Court of Appeal.

[11] During the hearing of this application for recusal, counsel for the 4th defendant has candidly informed this court that they have filed a Notice of Appeal against the decision to dismiss their stay application ('the third appeal'). At the same time, they have also filed an application under s. 44 of the Courts of Judicature Act 1964 in the Court of Appeal to stay all proceedings before this court.

Submission Of Parties

[12] It is the submission of the 4th respondent that the LJC should recuse herself from hearing this case as it would appear to a reasonable and right-thinking member of the public that there is a real danger of bias "by reason that there may be a case of pre-judgment". The case of pre-judgment is premised on the following decisions of the LJC:

(i) as the reliefs in the *ex parte* injunction are similar to the final reliefs in the OS, by granting the *ex parte* injunction it is just like granting the final reliefs. Therefore it would appear to a reasonable and right-thinking member of the public that there is a real danger of bias by reason of pre-judgment.

(ii) as the LJC had decided on the issue of '*locus standi*' raised by counsel for the 4th respondent in the opposed *ex parte* application for injunction, therefore "in the event that the LJC proceeds to hear the OS proper, and the *locus standi* issue is

raised again, it is unavoidable fact that the LJC will not be inclined to decide in favour of the 4th defendant given her previous decision". Again, there is here a grave danger of pre-judgment.

[13] The second submission is on the 'sequence of events'. It is the submission of counsel for the 4th defendant that they had objected to the application filed by the plaintiff to add MTB as a co-plaintiff on the basis that it is a "tactical manoeuvre by the plaintiff to prejudice the 4th defendant in the event the Court of Appeal allows the appeal against the injunction." The prejudice to the 4th defendant is premised on their earlier submission on *locus standi*. Therefore, since this court had allowed the application to add MTB as the 2nd plaintiff, it effectively removes the ground of *locus standi* as the basis for the appeal.

[14] What happens next is the application to stay the whole proceedings pending the hearing of the appeals in the Court of Appeal. It is the submission of the 4th defendant that the dismissal of the stay application, together with this court decision to add MTB as the co-plaintiff "would appear to the reasonable and right-thinking member of the public that this court may have prejudged the issues before the hearing of the OS".

[15] In reply, counsel for the plaintiffs submitted that there is no pre-judgment as there was no determination of the merits of the OS and that there has not been any finding of facts in the opposed *ex parte* application. On the issue of *locus*, the court has to decide as the issue was raised by counsel for the 4th defendant. Therefore the plaintiffs submit that an adverse decision made cannot be the basis to disqualify a judge. To rule otherwise would open the floodgates and enable every party who has an adverse decision against him to disqualify the judge and seek to choose another judge. That would amount to judge-shopping. Further, the *ex parte* injunction never took effect because of immediate stay and it lapses after 21 days.

The Findings Of The Court

[16] Both counsel relied on the decision of the Court of Appeal in *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors* [2002] 4 CLJ 268; [2003] 1 MLJ 78 for the test to be applied in an application for recusal, where the court said at p. 276 (CLJ):

A Having regard to the events or circumstances mentioned, and the reasons for the decision stated in the judgment of the court, *would it appear to the ordinary, reasonable and well-informed member of the public that there is a real possibility of bias by reason of prejudgment or prejudice on the part of Denis Ong Jiew Fook JCA* to hear the appeal proper in the sense that he might unfairly regard with disfavour the case of the applicants who are parties to the issues in the appeal which issues are to be considered by him in the second quorum. (emphasis added)

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[17] The court went further to state that any allegation of pre-judgment must be firmly established by the applicants. At p. 281 (CLJ), the court said this:

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My legal response to that allegation is to repeat what Mason J observed in *Re JRL, Ex parte* CJL which was quoted above:

D There *may be many situations in which previous decisions of a judicial officer on issues of fact and law may generate an expectation that he is likely to decide issues in a particular case adversely to one of the parties. But this does not mean* either that he will approach the issues in that case otherwise than with an impartial and unprejudiced mind in the sense in which that expression is used in the authorities or *that his previous decisions provide an acceptable basis for inferring that there is a reasonable apprehension that he will approach the issues in this way. In cases of this kind, disqualification is only made out by showing that there is a reasonable apprehension of bias by reason of prejudgment and this must be "firmly established"*: ...

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And in the case of the applicants, pre-judgment has not been established by them. (emphasis added)

[18] In the case of *Tai Choi Yu v. The Tribunal of the Special Commissioners of Income Tax & Anor* [2004] 1 LNS 243, that was relied by the 4th defendant, Justice Abdul Aziz said this:

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In my view whatever the test may be, be it real likelihood of bias or that of real danger of bias, the burden is on the applicant to show that if the judge against whom recusal is requested does nor recuse himself, the impression on the mind of a reason and well informed public is that the hearing or trial would not be fair because impartiality of the judge, in the circumstances, is being questioned.

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[19] Therefore, the question that begs the answer in this case is whether the 4th defendant has firmly established that having regards to the circumstances and the reasons for the decision of this court, would it appear to the ordinary, reasonable and well-informed member of the public that there is a real possibility of bias by reason of pre-judgment on the part of the LJC to hear the main application in the OS.

Issue (i) – That The Reliefs In The Ex Parte Injunction Are Similar To The Final Reliefs In The OS

[20] It is not in dispute that the reliefs in the application for *ex parte* interlocutory injunction are similar to the final reliefs in the OS. However it must be emphasised here that the threshold test applicable in an interlocutory injunction is different from that of the main application itself. In an interlocutory application, the court is merely required to make a finding of serious issues to be tried, whereas the merits of the case will be decided in the hearing of the OS itself. On the status of an interlocutory injunction, the Supreme court in *Perumahan Farlim (PG) Sdn Bhd & Ors v. Cheng Hang Guan & Ors* [1989] 2 CLJ 967; [1989] 1 CLJ (Rep) 127; [1989] 3 MLJ 223 said this:

> **The object of an interlocutory interim injunction is to preserve matters in *status quo* until the case be tried**. Such an injunction is therefore usually so framed as to continue in force until the hearing of the cause or until further order. **It cannot be considered in argument as affecting the ultimate decision of a cause**. In *Gilbert v. Endean* [1878] 9 Ch D 259 at pp. 268-9, the matter was clearly stated by Cotton LJ at p. 268:
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> > ... those **applications only are considered interlocutory** which do not decide the rights of parties, but **are made for the purpose of keeping things in *status quo* till the rights can be decided**, or for the purpose of obtaining some direction of the court as to how the cause is to be conducted, as to what is to be done in the progress of the cause for the purpose of enabling the court ultimately to decide upon the rights of the parties. (emphasis added)

[21] This position has been reaffirmed by the Federal Court in *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors* [1995] 1 CLJ 461 where Jemuri Serjan CJ (Borneo) held at p. 463:

At an interlocutory proceeding for an injunction, the court is not called upon nor is it desirable for the court to decide finally on the rights of the parties *but the court must be satisfied that there is a serious issue to be tried. The court is not justified in embarking on anything resembling the trial of the action upon conflicting affidavits nor to evaluate the strength of either party's case* ... (emphasis added)

[22] In the judgment of this court in the opposed *ex parte* application, this court made the following findings:

The Law

[18] The requirements to obtain interim injunctive relief were clearly set down in *Keet Gerald Francis Noel John v. Mohd Noor bin Abdullah* [1995] 1 MLJ 193, which are as follows:

(i) Whether there is any *bona fide* serious to be tried;

(ii) To consider the justice of the case;

(i) Whether damages is an adequate remedy.

The Findings of the Court

(i) Whether there are any *bona fide* serious issues to be tried

[19] Having perused the application and affidavits of the Plaintiff and after hearing submissions of Counsels, I am of the considered opinion that there are *bona fide* serious issues to be tried. My reasons are as follows:

(i) Under section 3.02 of the Debenture, all assets, intellectual property, licence of the Company are charged to MTB by way of a fixed charge.

(ii) Under section 7.03 of the Debenture, the Plaintiff, as the R & M, has the power to take possession of and get in all the secured assets of the Company.

(iii) Under section 3.06(3)(b) of the Debenture, the Company is also prohibited from leasing or parting with possession of any of its charged assets or properties.

(iv) However, purportedly in breach of section 3.06(3)(b) of the Debenture, the Company had transferred all its business to the Carotec BF, the 4th Defendant, including the lease over Business premises 1 and Business Premises 2 by way of a resolution dated 10.8.2012 (see exhibit A-9). This happen after the security under the Debenture has become enforceable.

(v) The 4th Defendant is a wholly owned subsidiary of the Company. As the holding company of Carotec BF, the Company also control the board of the Carotec BF and the directors of Carotec BF are also nominees of the Company. (see exhibit A-7)

(vi) As such, I am of the considered opinion that there are serious issues to be tried as to whether the Company can transfer its charged assets to its wholly subsidiary company, Carotec BF, purportedly in breach of section 3.06(3)(b) of the Debenture. The validity of the transfer is also questionable as it was made during the subsistence of a Restraining order under section 176(10C) of the companies Act 1965. From the company search, exhibit "A-8" and "A-10", Carotec BF is a dormant company with no revenue and assets. What then is the consideration for the transfer of the assets from the Company to Carotec BF. Is it really a genuine transfer or merely a sham to divert the assets away from the R & M. There is also the issue of whether the said arrangement with Carotec BF constitutes an attempt by the Company to evade its contractual obligations under the Debenture. I am satisfied that all these issues are *bona fide* serious issues to be tried.

(ii) The Justice of the case

[20] I am also of the considered opinion that the justice of the case warrants the granting of the interlocutory injunction. There is a grave concern of the Plaintiff over the transfer of the charged property of the Company to its wholly subsidiary company, Carotec BF. Further, the persistent denial of access to the company business premises raised the concerns over possible dissipation of the charged assets.

(iii) Whether damages is an adequate remedy

[21] I am also of the considered opinion that damage is not an adequate remedy as the company search disclosed that Carotec BF is a dormant company and only managed to secure assets from the company, which forms the subject matter of this action.

[23] It is very clear that the judgment of this court in the opposed *ex parte* interlocutory stage did not deal with the merits of the OS but merely on the issue of whether there is any *bona fide* serious issue to be tried that warrants the granting of the

A *ex parte* injunction. Even though the reliefs in the *ex parte* application are similar to the OS, this court had not dealt with the merits of the application. There is no finding of facts at the interlocutory stage. Indeed it is a requirement of the law that this court must make a finding in the interlocutory stage. The court
B must decide whether to grant the application or to dismiss it. There is no such thing as abdicating one's judicial duties by refusing to decide or abstaining from making any decision simply because the reliefs in the interlocutory application are similar to the main application.

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[24] Bearing in mind that this court had only made a finding of *bona fide* serious issue to be tried at the interlocutory stage, and has yet to deal with the merits of the application, what then is the stand of the ordinary, reasonable and well informed member
D of the public? The answer can be found in the reasoning of Justice Abdul Aziz Mohamad in *Alor Janggus (supra)* where His Lordship said at p. 285:

> The appellants in para. 5 of their affidavit were in effect saying that even though the dismissal of the appeal was on purely
E technical or procedural grounds, and even though, therefore, Denis Ong JCA had not considered the merits of the appeal or formed any idea in his mind as to the merits of the appeal, an impartial, reasonable and fair-minded bystander who knew of those circumstances, would nevertheless, simply because the appeal was
F dismissed, fear that when Denis Ong JCA heard the appeal on its merits he would not be able to keep his deliberations free from bias even though he tried his best to do so. But the appellants did not say by what process of thinking the fair-minded and informed bystander would entertain a fear of bias from those circumstances. Knowing *that Denis Ong JCA had not been involved*
G *in the merits of the appeal, what would make the fair-minded bystander fear that he might be biased when he came to consider the merits? Rather it is, I thought, the ignorant and unreasonable bystander who would entertain such a fear.* It is not so much the fact that a decision adverse to the appellants that is the dismissal of their appeal had
H been made that is important. *What is important is the fact that in making that decision the panel, including Denis Ong JCA, had not considered the merits. No reasonable bystander who knows of the circumstances would fear that Denis Ong JCA might be affected by bias when he comes to consider the merits.* There was, in my view, simply no circumstance to cause a fair-minded and informed bystander to
I entertain a fear of real danger of bias. I was, therefore, of opinion that the application should be dismissed. (emphasis added)

[25] In any event, during the hearing of the OS, the court will have to reconsider all the issues raised in light of all the affidavits filed in order to make a finding. In *Cheng Hang Guan & Ors v. Perumahan Farlim (PG) Sdn Bhd & Ors* [1988] 2 CLJ 35; [1988] 1 CLJ (Rep) 435; [1988] 3 MLJ 90 Justice Edgar Joseph Jr said this:

> In my opinion, **the order of Mustapha J refusing the plaintiffs the interlocutory injunction** in so far as the vegetable plot was concerned, on the ground that damages would be an adequate remedy, *was merely a prima facie view and lacked the essential element of finality since it is always open to the High Court, at the final hearing, to review the question involved and to arrive at an opposite conclusion in the light of all the evidence, both oral and documentary, should the circumstances so require*. Accordingly, the legal effect of the refusal of the interlocutory injunction was simply, that at the interlocutory stage, based on the limited material then available, the plaintiffs were not entitled to the injunctive relief claimed. It follows, then, that in a situation such as the present, *the law invests the High Court, after dismissing the application for interlocutory injunctive relief, with continuous authority thenceforth to entertain any application by the disappointed party for the like relief on proof of altered circumstances and to grant such relief if it appears to be warranted by the evidence*. (emphasis added)

[26] For the reasons given above, I am of the considered opinion that the 4th defendant has failed establish that there is a real danger of bias by reason pre-judgment with regards to the issue of similar prayers in both the interlocutory application and the OS.

Issue (ii) – Locus Standi

[27] The 4th defendant submits that since the LJC had decided on the issue of '*locus standi*' raised by their counsel in the opposed *ex parte* application for injunction, therefore "in the event that the LJC proceeds to hear the OS proper, and the *locus standi* issue is raised again, it is unavoidable fact that the LJC will not be inclined to decide in favour of the 4th defendant given her previous decision".

[28] The issue of *locus standi* was raised by counsel for the 4th defendant. In fact he only submitted on the *locus standi* issue during the opposed *ex parte* application for injunction. If counsel had raised the issue and asked the court to decide the same, is it proper for counsel to complain later that it amounts to real danger

of bias by reason of pre-judgment simply because it was not decided in his favour. I do not think so and on this I refer to the judgment of Justice Denis Ong in *Alor Janggus* where His Lordship said at p. 280:

> From what has just been said it must be equally obvious that whether a decision is favourable or adverse depends upon by whom it is perceived ie, by the respondents or by the applicants. Where it is favourable to one party, there would be no application for recusal for sure; but where it is adverse to the other party there might be, as in the case of the applicants here. Surely, a decision that is adverse to a party is not *per se* ordinarily a ground to disqualify a judge as observed by Lord Bingham CJ and Mason J above.

Issue (iii) – Sequence Of Events

[29] It is the 4th defendant's submission that the sequence of events, from granting the *ex parte* application, allowing the plaintiff application to add MTB as the co-plaintiff and the refusal to grant the order to stay the whole proceedings, all adds up to "the reasonable and right-thinking member of the public" thinking that this court may have prejudged the issues before the hearing of the OS proper. (See para. 18 of 4th defendant written submission)

[30] However, I must emphasise here that we are concerned with the "ordinary, reasonable and well informed member of the public", who would appreciate that the duties of the courts are to make decisions based on the facts and laws that are relevant, and of course at times, with the assistance of submissions of counsels. The reasonable and well informed member of the public would also appreciate that the losing parties have a right to appeal to the appeal courts, subject again to the laws applicable. All these are the natural sequence of events in any litigation, according to the law. It cannot be a basis of complaint that losing a number of applications would invariably make the "ordinary, reasonable and well informed member of the public" think that there is a real danger of bias by reason of pre-judgment. In this case, even though the *ex parte* interlocutory injunction was granted, it was immediately stayed by this court on the application by the 4th defendant, until it lapsed and was subsequently withdrawn by the plaintiffs. It never took effect. Therefore, winning in one and losing in three applications cannot be the criteria of pre-judgment.

The "ordinary, reasonable and well informed member of the public", would appreciate that these applications went through the process of law, decisions were made and the aggrieved parties may take up the matter on appeal. Again, I find that the 4th defendant has failed to establish that there is a real danger of bias by reason of pre-judgment based on the sequence of events.

Conclusion

[31] To conclude, I only need to refer to the judgment of Justice Denis Ong in *Alor Janggus (supra)* at p. 281:

> In the premises I conclude that the objection of the applicants is without substance. There is no ground for the ordinary, reasonable and well-informed member of the public to suppose that I might not bring an impartial and unprejudiced mind to bear on the issues in the substantive appeal. Neither is there any reason for the applicants to doubt that they would receive a fair hearing before me in the second quorum. Thus, in my judgment this was not a right and proper case for me to abdicate my judicial function and to stand down from the second quorum upon the request of the applicants. As Edgar Joseph Jr. FCJ stated in *Majlis Perbandaran Pulau Pinang* at p. 129, the reason for the preference of the real danger of bias test was to "avoid setting aside of judgments upon quite insubstantial grounds and the flimsiest pretexts of bias.

[32] For the reasons enumerated above, encl. (89) is dismissed with costs. With regards to cost, I take note that the 4th defendant had filed this application when the application to stay the whole proceedings was dismissed. The 4th defendant had appealed against the said decision as well as to invoke s. 44 of the CJA by filing a similar application in the Court of Appeal. Indeed, in the application for stay, it was the submission of the 4th defendant that if stay was granted, it would obviate the need to file a recusal (see also para. 14 of 4th defendant's affidavit). And the basis for the recusal is the allegation of bias, *albeit* a less sinister category, that is bias by reason of pre-judgment. This I find not to be the usual or normal sequence of events, but borders more towards abuse of process and contempt. As such, I make an order that cost be awarded to the plaintiffs to be taxed on an indemnity basis, by the 4th defendant.